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MKINI DOTCOM SDN BHD & ORS v. CHIEF JUDGE OF MALAYA & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ASMABI MOHAMAD J
[JUDICIAL REVIEW NO: 25-164-06-2015]
B 3 AUGUST 2015

ADMINISTRATIVE LAW: *Judicial review – Application for – Distribution of business among judges – Powers conferred to Chief Judge of Malaya pursuant to s. 20 of Courts of Judicature Act 1964 ('CJA') – Whether directives given by Chief* C *Judge of Malaya under s. 20 of CJA opened to challenge – Whether applicants' application for judicial review was frivolous, vexatious and filed out of time – Whether applicants had liberty to apply for recusal against assigned judge*

The second and third respondents commenced a civil suit against all three D applicants at the High Court of Malaya at Kuala Lumpur ('the civil suit'). The civil suit was case managed by the Deputy Registrar of the High Court. On the first case-management date, the parties were informed that Justice Datuk Wira Kamaludin ('the said judge') was assigned to hear the civil suit. The applicants applied to recuse the said judge who was a Judicial Commissioner at the material time on the ground of conflict of interest. On E 14 November 2014, the applicants withdrew the application for recusal as the said judge had by then been appointed as a judge of the High Court of Malaya and filed their defence and counterclaim. On 1 January 2015 the said judge was transferred to the High Court of Malaya at Seremban. The second and third respondents thereafter, applied to strike out the defence and F counterclaim of the applicants and for judgment to be entered in the civil suit ('the striking out application'). On 13 February 2015 the applicants were informed by the Deputy Registrar during case-management that the said judge was to continue hearing the civil suit and the striking out application. As such, the applicants sought confirmation from the Chief Judge of Malaya G as to whether such direction assigning the case to the said judge was made despite the said judge having been transferred to the High Court at Seremban. *Vide* a letter dated 16 March 2015, the special officer confirmed the direction by the Chief Judge of Malaya for the said judge to hear the civil suit as the said judge had managed the civil suit from the outset it was prudent for the said judge to hear the same ('the first decision'). Thereafter, *vide* a letter dated H 28 May 2015, the special officer of the Chief Judge of Malaya reiterated the position that the said judge had been directed to hear the civil suit until its conclusion and if the applicants had their reservations, they were at liberty to apply for the recusal of the said judge and they might also apply for the civil suit to be heard by another judge ('the second decision') (collectively I referred to ('the decisions'). The applicants averred that the Chief Judge of Malaya acted *ultra vires* s. 20 of the Courts of Judicature Act 1964 ('CJA')

and/or with no legal basis in making each or either decisions. As such, the applicants *vide* encl. 1 sought, *inter alia*, for (i) a declaration that the Chief Judge of Malaya had acted without lawful basis in making the decisions and pursuant thereto assigning the said judge to hear the civil suit; (ii) an order of *certiorari* to remove into the High Court of Malaya and to quash the decisions or any of them; and (iii) an order of *mandamus* directing the Chief Judge of Malaya to assign a judge of the Civil Division, Kuala Lumpur High Court to hear the civil suit. The issues that arose for determination, amongst others, were (i) whether the application *vide* encl. 1 was frivolous and vexatious as it was not made within the time prescribed in O. 53 r. 3(6) of the Rules of Court 2012 ('ROC'); and (ii) whether s. 20 of the CJA and the direction of the Chief Judge of Malaya was amenable to judicial.

Held (dismissing encl. 1 with costs):

(1) The time within which an application for judicial review must be filed is provided in O. 53 r. 3(6) of the ROC. Compliance with the time frame prescribed under O. 53 r. 3(6) is fundamental as it affects the jurisdiction of the court to hear the application. Once the issue of limitation had been raised, the merits of the case irrelevant for the court to consider. On the facts, the decision was communicated to the applicants by the Deputy Registrar on 13 February 2015 during the case management of the civil suit, but the applicants filed the judicial review application on 12 June 2015. Therefore, the application was filed 29 days out of time. Since the application was made out of the time prescribed by O. 53 r. 3(6) of the ROC, the court had no jurisdiction to hear the same. The application was therefore frivolous and vexatious and on this ground alone, the application ought to be dismissed with costs. (paras 13-16 & 27)

(2) The directions and/or decisions pertaining to the distribution of business among judges of the High Court by the Chief Judge of Malaya is not amenable to judicial review. The nature of the power exercised by the Chief Judge of Malaya pursuant to s. 20 of the CJA is discretionary. The power concerns the internal management of the High Court and the Chief Judge of Malaya is conferred absolute discretion to manage the distribution of work in the High Court of Malaya. It is His Lordship's management's prerogative to determine how the allotting or dispensing of work among the judges of the High Court is to be done. It is a matter of grave public interests that directives given by the Chief Judge of Malaya under s. 20 of the CJA are not opened to challenge. Such actions would bring the business of the High Court to a grind. This is a strong compelling reason to exclude the general assumption that power that stems from statute is amenable to judicial review from the nature of the power that was exercised in this case. (paras 28, 45 & 46)

(3) There is insufficient public element, flavour or character to bring a decision directing a particular judge to hear a case within the purview of public law. The section provides no conditions or limitations in the exercise of the power, which is necessary to inject the element of public law in the decision made so as to attract the remedies of administrative law. (para 47)

(4) Section 20 of the CJA is declaratory in nature. It requires that the business of the High Court is carried out as directed by the respective Chief Judges. The provision does not confer any right, whether directly or by implication, on the parties to object that the judge assigned to hear any proceeding ought to be replaced by another judge. However, this does not mean that the parties are without remedy as the parties have the right and are at liberty to apply for recusal of any judge assigned to hear their matter. (para 48)

(5) The facts in the case showed that the suit was to be heard by the said judge pursuant to the Chief Judge of Malaya's 'general' power of the distribution of business of the High Court prevailing at the Kuala Lumpur High Court. Upon his transfer to the High Court at Seremban the Chief Judge made a direction pursuant to his 'particular' power for the said judge to continue hearing the matter. Both directions are but the manifestation of the exercise of power conferred upon the Chief Judge by s. 20 of the CJA. Therefore, had the said judge not been transferred and remained in the High Court at Kuala Lumpur, there would have been no issue for him hearing the suit upon the recusal application having been withdrawn. Thus, leave ought not to be granted to the applicants to pursue the matter on the substantive motion. (paras 49-51)

Case(s) referred to:

Ahli-Ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-Hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals [2012] 1 CLJ 805 FC ***(refd)***

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

Chong Siew Choong v. PP [1996] 2 CLJ 823 HC ***(refd)***

Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia [2013] 2 CLJ 1009 FC ***(refd)***

Malacca Securities Sdn Bhd v. Loke Yu [1998] 3 CLJ 22 HC ***(refd)***

Manjit Singh Kirpal Singh and Another v. Attorney-General [2013] 2 SLR 1108 ***(refd)***

Mohit v. Director of Public Prosecutions of Mauritius [2006] 1 WLR 3343 ***(refd)***

R v. Secretary of State for Home Department, ex parte Rushkanda Begum [1990] Crown Office Digest 109 ***(refd)***

R v. Hampshire Farmers' Market Ltd [2004] 1 WLR 233 ***(refd)***

Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor [2013] 4 CLJ 193 FC ***(refd)***

WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 18(2), 20
Federal Constitution, arts. 5(1), 8(1), 40, 122AA, 122B(1)
Legal Profession Act 1976, s. 90(1), (3)
Rules of Court 2012, O. 35 r. 11, O. 53 r. 3(2), (6)

For the applicants - Ashok Kandiah (Eugene Jayaraj with him); M/s Kandiah Partnership
For the 1st & 3rd respondents - Amarjeet Singh Serjit Singh; SFC
For the putative respondents - Mohd Hafarizam Harun (Norhazira Abu Haiyan & Nik Nuraisha Alia with him); M/s Hafarizam Wan & Aisha Mubarak

Reported by Sandra Gabriel

JUDGMENT

Asmabi Mohamad J:

The Application

[1] By this application (encl. 1) the applicants had sought for the following orders:

(i) a declaration that the Chief Judge of Malaya had acted without lawful basis in making the decisions dated 16 March 2015 ("the first decision") and/or 28 May 2015 ("the second decision") and pursuant thereto assigning Justice Datuk Wira Kamaludin bin Mohd Said ("the said judge") to hear Kuala Lumpur Civil Suit No. 23NCVC-26-05-2014 ("the civil suit") (collectively referred to as "the decisions");

(ii) an order of *certiorari* to remove into the High Court of Malaya and to quash the decisions or any of them; and

(iii) an order of *mandamus* directing the Chief Judge of Malaya to assign a judge of the civil division, Kuala Lumpur High Court to hear the civil suit.

The Facts Stated In The O. 53 r. 3(2) Statement

[2] The facts which the applicants relied on to support the application for leave were as stated in the statement pursuant to O. 53 r. 3(2) of the Rules of Court 2012 ("the statement") (encl. 2). These facts were verified by the second applicant for himself and the rest of the applicants in the affidavit affirmed on 12 June 2015 (encl. 3).

[3] The first applicant is a mass media company which owns the website known as www.malaysiakini.com, the second applicant is the editor-in-chief of the website and the third applicant is the chief editor of the website. The civil suit was commenced by the second and third respondents on 30 May 2014 against all three applicants at the High Court of Malaya at Kuala Lumpur.

[4] The chronology of events pertaining to the management of the civil suit could be summarised as follows:

(i) the civil suit was case managed by the Deputy Registrar of the High Court on 18 June 2014, 8 July 2014 and 2 December 2014 respectively for purposes of exchanging of pleadings.

(ii) on the first case management dated on 18 June 2014 the parties were informed that the said judge was assigned to hear the civil suit.

(iii) the applicants applied to recuse the said judge who was a Judicial Commissioner at the material time on the ground of conflict of interest, in light of the third respondent being responsible for advising the Yang di-Pertuan Agong under art. 122B(1) of the Federal Constitution and the Yang di-Pertuan Agong is bound to act on the advice of the third respondent by virtue of art. 40 of the Federal Constitution.

(iv) the application for recusal came up for hearing before the said judge on 3 September 2014 and was adjourned to 14 November 2014.

(v) on 14 November 2014 the applicants withdrew the application for recusal as the said judge had by then been appointed as a judge of the High Court of Malaya.

(vi) the defence and the counterclaim was filed on 17 December 2014.

(vii) on 1 January 2015 the said judge was transferred to the High Court of Malaya at Seremban.

(viii) On 28 January 2015, the second and third respondents in the civil suit applied to strike out the defence and counterclaim of the applicants and for judgment to be entered in the civil suit ("the striking out application").

(ix) on 13 February 2015 the applicants were informed by the Deputy Registrar during case management that the said judge was to continue hearing the civil suit and the striking out application.

[5] The decision directing the said judge to hear the judgment application was viewed by the applicants as being inconsistent with the law and practice. The applicants (see para. 11 of encl. 2) averred that there was no basis in law and/or in fact:

(i) for the direction under s. 18(2) of the Courts of Judicature Act 1964 ("the CJA") or O. 35 r. 11 of the Rules of Court 2012 as the trial had yet to commence and pre-trial directions had yet to be given;

(ii) for any direction for a judge other than a judge of the civil division of the Kuala Lumpur High Court to hear the "striking out application"; and

(iii) for the said judge to be directed to hear an application arising out of a civil suit filed in the civil division of the Kuala Lumpur High Court. A

[6] In view of the direction, the applicants stated that they had through their solicitors *vide* the letter dated 3 March 2015 sought confirmation from the Chief Judge of Malaya as to whether such direction assigning the case to the said judge had in fact been made despite the said judge having been transferred to the High Court at Seremban. *Vide* the same letter the applicants' solicitors had also intimated that they have no objections for the same to be assigned to another judge of the civil division of the High Court at Kuala Lumpur for further conduct until final conclusion (see para. 12 of encl. 2). B C

[7] Subsequent to that there were exchanges of the letters between the applicants' solicitors and the special officer of the Chief Judge of Malaya, amongst others, the following were communicated:

(i) *vide* a letter dated 16 March 2015 the special officer confirmed that there was such a direction by the Chief Judge of Malaya for the said judge to hear the civil suit. The reason being as the said judge had managed the civil suit from the outset it was prudent for the said judge to hear the same. This was for purposes of expediency as the said judge was familiar with facts and the case file ("the first decision"). The applicants had considered the letter dated 16 March 2015 as the letter which communicated the direction of the Chief Judge of Malaya pertaining to the distribution of the case to the said judge to hear (see para. 12.2 of encl. 2). D E

(ii) the applicants' solicitors responded *vide* a letter dated 31 March 2015 to impress upon the Chief Judge of Malaya that the said judge had never managed the case as the case managements were at all times conducted by the Deputy Registrar. The solicitors emphasised that the said direction was a clear departure from the usual practice and that the Chief Judge of Malaya might not have been properly apprised of the facts when making the first decision. F G

(iii) *vide* a letter dated 28 March 2015 (the date should be 28 April 2015) the special officer of the Chief Judge of Malaya informed the applicants' solicitors that the said judge had been directed to hear the civil suit until its conclusion. It was stated that since the said judge had heard applications arising from the said civil suit on 3 September 2015 and 14 November 2014 respectively with respect to the recusal application, it would be proper for the said judge to hear the case until its conclusion. H

(iv) *vide* a letter dated 20 May 2015 the applicants' solicitors clarified that the said judge had merely dealt with the recusal application that came up before the said judge on 3 September 2014 and the same was I

adjourned to the 14 November 2014 where counsel merely appeared before the said judge to withdraw the application. The applicants were of the view that there was a misconception of the true state of affairs and urged that the first decision be reconsidered.

(v) *vide* a letter dated 28 May 2015 the special officer of the Chief Judge of Malaya reiterated the position that the said judge had been directed to hear the civil suit until its conclusion and if the applicants had their reservations for whatever reasons they deem fit, they were at liberty to apply for the recusal of the said judge and they might also apply for the civil suit to be heard by another judge ("the second decision"). This second decision was considered by the applicants to be a separate decision by the Chief Judge of Malaya refusing to reconsider the first decision (see para. 12.10 of encl. 2).

The Grounds For Judicial Review

[8] The decisions which the applicants were seeking this court to quash and/or the declarations, which the applicants were seeking from this court, were as follows:

(i) the first decision made *vide* the letter dated 16 March 2015 and the direction of the Chief Judge of Malaya assigning the said judge to hear the civil suit; and

(ii) the second decision made *vide* the letter dated 28 May 2015 and the refusal of the Chief Judge of Malaya to reconsider the decision assigning the said judge to hear the civil suit.

[9] The grounds relied by the applicants could be gleaned from the statement filed pursuant to O. 53 r. 3(2) of the Rules of Court 2012 and the gists were as follows (see paras. 14 and 15 of encl. 2):

(i) the Chief Judge of Malaya acted *ultra vires* of s. 20 of the CJA and/or with no legal basis in making each or either of the decisions.

(ii) that even if the Chief Judge of Malaya is seized with power to make the decisions, His Lordship had failed to take into consideration the following:

(a) There was no basis for the said judge to be assigned to hear the civil suit as the said judge had been assigned to the High Court at Seremban;

(b) The decisions were inconsistent with the usual practice. Thus, the civil suit was being treated differently from other civil suits filed in the civil division of the Kuala Lumpur High Court and giving rise to an impression that is inconsistent with the due administration of justice.

(iii) the decisions, or either of these decisions, were illegal for being:

(a) Contrary to s. 20 of the CJA and/or art. 122AA of the Federal Constitution;

(b) Contrary to arts. 5(1) and/or 8(1) of the Federal Constitution; and

(c) Unreasonable.

The Law

[10] It is settled law, the function of the court in exercising its power to grant leave for judicial review is to sieve through the application before it by examining the facts and the law and decide if the case is one which is frivolous and or one which merits further argument on the substantive motion. In exercising this function the court is guided by the principles laid down by the Court of Appeal in England in *R v. Secretary of State for Home Department, ex parte Rushkanda Begum* [1990] Crown Office Digest 109, Dip as follows:

(i) if it is clear to the judge that there is a point for further investigation on a full *inter parte* basis with all evidence as is reasonably necessary on the facts and all such arguments on the law then leave ought to be granted;

(ii) if the judge hearing the leave application is satisfied that there is no arguable case the judge should dismiss the application for leave to move for leave for judicial review; and

(iii) if the judge is not really sure whether there is or is not an arguable case, the judge may invite the putative respondent to attend and submit as to whether or not leave ought to be granted; and

(iv) in exercising the powers in an *inter parte* leave application the test applicable by the court must be the same approach as the test adopted in deciding whether to grant leave to appeal against the arbitrator's award. The court has to consider the facts and law before it and ask itself whether the court is satisfied that there is a case fit for further consideration or otherwise.

[11] The Federal Court had elaborated and reiterated the test for granting leave in *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478 as follows:

> Leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome. A rider must be attached to the application though i.e. unless the matter for judicial review is amenable to judicial review no success may be envisaged.

(see *Ahli-Ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals* [2012] 1 CLJ 805; [2011] MLJU 698)

[12] Based on the above high authorities applicants applying for leave to be granted must show the following:

(i) the point taken is not frivolous and vexatious;

(ii) leave would be granted if the point taken justifies an arguable case in favour of granting the reliefs sought at the substantive stage; and

(iii) the matter raised is amenable for judicial review.

The Issues

Issue 1: Whether The Application Is Frivolous And Vexatious As It Was Not Made Within The Time Prescribed In O. 53 r. 3(6)

[13] The time within which an application for judicial review must be filed is provided in O. 53 r. 3(6) of the Rules of Court 2012:

> An application for judicial review shall be made promptly and in any event within three months from the date when the grounds of application first arose or when the decision is first communicated to the applicant.

[14] Compliance with the time frame prescribed under O. 53 r. 3(6) is fundamental as it affects the jurisdiction of the court to hear the application. The law on this subject is trite. It is mandatory to comply with the time frame in O. 53 r. 3(6). This principle had been emphasised by the Federal Court in *Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor* [2013] 4 CLJ 193; [2013] 4 MLJ 161 at p. 207 (CLJ); p. 171 (MLJ) as follows:

> In conclusion, we are of the view that the time frame in applying for judicial review prescribed by the Rules is fundamental. It goes to jurisdiction and once the trial judge had rejected the explanation for the delay for extension of time to apply for judicial review, it follows that the court no longer has the jurisdiction to hear the application for leave for judicial review. Whether the application has merits or not, is irrelevant.

[15] Once the issue of limitation had been raised, the merits of the case are irrelevant for the court to consider. It follows from this that the threshold at leave stage of a judicial review hearing being low is also irrelevant. The only question at this stage is whether, on the facts disclosed in the statement, the application is filed out of time.

[16] Since the applicants filed the judicial review application on 12 June 2015, the application was filed 29 days out of time. This is based on the admitted fact that the decision was communicated to the applicants' solicitors by the Deputy Registrar on 13 February 2015 during the case management of the civil suit (see letter dated 3 March 2015 at p. 288 of encl. 3).

[17] The applicants' contended that the application was filed within time as time only began to run from 16 March 2015 which was the date when decision of the Chief Judge of Malaya assigning the said judge to hear the civil suit was first communicated to the applicants in a letter by the Chief Judge of Malaya.

[18] The applicants' contention was rebutted by the contents of their own letter dated 3 March 2015 to the Secretary of the Chief Judge of Malaya. In this letter, the applicants' solicitors stated that they were informed by the Deputy Registrar during case management that the civil suit and any interlocutory matters therein would be heard by the said judge despite the fact that His Lordship had been transferred to the High Court at Seremban. This could be gleaned from the language and the tone of the letter (see p. 288 encl. of 3):

> Pada masa Pengurusan Kepada 13-2-2015 di hadapan Timbalan Pendaftar Puan Mazuliana Binti Abdul Rashid, pihak-pihak dimaklumkan bahawa tindakan di atas, serta permohonan-permohonan interlokutori akan masih didengar oleh Yang Arif Hakim Datuk Wira Kamaludin bin Md Said, walaupun Y.A. telah dipindahkan ke Mahkamah Tinggi Seremban.

[19] The case management is a pre-trial judicial process and the forum for orders and directions concerning the case to be given by the judicial officer in order to prepare the file for hearing. Hence, the decision was in fact communicated to the applicants on 13 February 2015. In the circumstances, the applicants were required to file their application challenging the decision on or before 14 May 2015, if they felt that what was done in this case was out of the ordinary and/or usual process and/or to lodge an appeal against the direction.

[20] The contention by the applicants that it was not apparent at the case management date whether it was the Chief Judge of Malaya who had made the decision is a feeble attempt to get around the limitation period. The following admissions which appeared on the face of the material placed before this court showed that the applicants knew all along that the decision was made by the Chief Judge of Malaya:

(i) the applicants stated in their statement (see para. 12 of encl. 2):

> In view of this curious state of affairs, the Applicants had through their solicitor written to the 1st Respondent (who is the Chief Judge of Malaya) to seek confirmation of whether a direction to that effect had been made.

(ii) the applicants also stated in their statement (see para. 12.1 of encl. 2) that:

> It was indicated in the same letter that, in the light of the pleadings just being closed, the Applicants had no objections for the matter to be assigned to another judge of the Civil Division of the Kuala Lumpur High Court.

[21] In the letter dated 3 March 2015 (see p. 288 of encl. 3) the applicants' solicitors stated:

> Dalam keadaan di atas, kami dengan rendah diri memohon supaya diberikan pandangan serta balasan daripada Yang Amat Arif untuk dasar keputusan tersebut.

[22] The above statements clearly indicated that the applicants knew that only the Chief Judge of Malaya could make such a direction and a direction to that effect had been made. It is pertinent to note that the letter was merely seeking confirmation that such a direction was in fact made by the Chief Judge of Malaya.

[23] The applicants further contended that the second decision in the letter dated 28 May 2015 was a separate decision wherein the Chief Judge of Malaya refused to reconsider the first decision.

[24] The above contention is rebutted by the contents of the letter dated 28 May 2015 which is self-explanatory. The letter reiterated the position held all along by the Chief Judge of Malaya and the reply to the applicants request for reconsideration of the direction was answered in the following words:

> Saya diarahkan oleh YAA Hakim Besar Malaya untuk merujuk kepada tersebut di atas dan surat tuan rujukan 1254.14.AK bertarikh 20 Mei 2015.
>
> 2. Seperti tuan sedia maklum, YA Datuk Wira Kamaludin bin Md. Said telah ditugaskan untuk mendengar kes ini sehingga selesai. Sekiranya pihak tuan masih ingin Hakim yang lain untuk mendengar kes ini, pihak tuan mempunyai kebebasan untuk memfailkan permohonan pengecualian Hakim daripada mendengar kes ini.

[25] The reply by the Chief Judge of Malaya was a direct response to the applicants' solicitors request in the letter dated 20 May 2015 which states as follows:

> Oleh kerana perkara dinyatakan di atas makluman anak guam kami adalah berasa tidak berasa selesa dengan perkembangan di dalam kes ini khususnya arahan untuk YA untuk mendengar kes ini yang adalah merupakan satu pelepasan daripada amalan lazim atau biasa.
>
> Maka, kami diarahkan untuk meminta supaya arahan tersebut dipertimbangkan semula demi kepentingan integrity sistem kehakiman.

[26] The contents of the letter dated 28 May 2015 must be considered with the above stated facts in mind. The Chief Judge of Malaya through his special officer had replied stating that the applicants' solicitors were aware that the said judge had been directed to hear the case until its conclusion and that if the applicants still wanted another judge to hear the case they were at liberty to make an application for the recusal of the said judge from hearing the case. It is not as if the applicants had reached a brick wall. There is a proper avenue opened to the applicants for the said judge to be recused from further conduct of the case by way of a formal application.

[27] Based on the aforesaid the application was made out of the time prescribed by O. 53 r. 3(6) of the Rules of Court and therefore this court has no jurisdiction to hear the same. The application is therefore frivolous and vexatious and on this ground alone, the application ought to be dismissed with costs.

Issue 2: Section 20 Of The CJA Is Not Amenable To Judicial Review

[28] The directions and or decisions pertaining to the distribution of business among judges of the High Court by the Chief Judge of Malaya is not amenable to judicial review. Section 20 of the CJA which governs the distribution of business in the High Court reads as follows:

> The distribution of business among the Judges of the High Court shall be made in accordance with such directions, which may be of a general or a particular nature, as may be given by the Chief Judge.

[29] The language used in s. 20 of the CJA is clear and unambiguous. The provision empowers the Chief Judge of Malaya to make directions of a general or particular nature concerning the distribution of business among the judges of the High Court. It is mandatory for the judges of the High Court to comply with such directions by the use of the words "shall be made in accordance with such directions".

[30] Under s. 20 of the CJA, the Chief Judge has an absolute power in relation to the distribution of the business among the judges of the High Court of Malaya. Section 20 of the CJA was considered in *Chong Siew Choong v. PP* [1996] 2 CLJ 823; [1996] 5 MLJ 65 at p. 829 (CLJ); p. 70 (MLJ) by His Lordship Abdul Malik Ishak J and His Lordship held as follows:

> In my opinion, s 20 of the Act gives an absolute power to the Chief Judge to distribute 'business' among judges of the High Court in accordance with the directions which he may give of a general or particular nature.

[31] There can be no appeal against the direction of the Chief Judge under s. 20. In *Malacca Securities Sdn Bhd v. Loke Yu* [1998] 3 CLJ 22; [1996] 6 MLJ 112 His Lordship Augustine Paul held as follows:

> Thus the section deals with the allotment or dispensing of work among the judges of the High Court in accordance with directions given by the Chief Judge. The nature of this function is clearly administrative in

A nature. It must be observed that the exercise of this power by the Chief Judge also includes a direction which can be given with respect to a single case. This flows from the use of the words "... a particular nature" in the section which means that the Chief Judge may direct that a particular case shall be heard by a particular High Court Judge. It would also include the sending of a case file pending before a judge of the High Court to another
B judge of the High Court at a different branch. A party who desires to have a case pending in a particular High Court to be heard by another High Court may therefore apply to the Chief Judge for directions to that effect. Needless to say there can be no appeal against any direction given by the Chief Judge.

C **[32]** Upon reading s. 20 of the CJA and guided by the interpretation given by the two learned justices in the above cited cases it is apparent that the Chief Judge's power under this provision is discretionary and/or administrative in nature and in exercising His Lordship's powers under the said section His Lordship is vested with an absolute power.

D *Whether The Direction Of The Chief Judge Of Malaya Is Amenable To Judicial Review*

[33] The next issue for determination is whether the direction of the Chief Judge of Malaya made pursuant to s. 20 of the CJA is amenable to judicial review.
E

[34] The applicants contended that the administrative power of the first respondent in respect of the distribution of business is clearly one of an administrative nature, and one made in public law. It is a power conferred by statute. According to the applicants all the criteria laid down in the
F authorities cited above were established on the facts of the case before the court.

[35] In supporting their case the applicants relied on Federal Court's decision in *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865; the Court of Appeal decision in *R (Beer) v. Hampshire*
G *Farmers' Market Ltd* [2004] 1 WLR 233; the Singapore Court of Appeal decision in *Manjit Singh Kirpal Singh and Another v. Attorney-General* [2013] 2 SLR 1108.

[36] The Federal Court's decision in *Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia* [2013] 2 CLJ 1009; [2013] 2 MLJ 321 at p. 1022
H (CLJ); p. 332 (MLJ) for instance reinforces the proposition that whether a discretionary decision made pursuant to a statute is amenable to judicial review or otherwise would depend on the facts of each particular case. The Federal Court held as follows:

I We have no hesitation in accepting that the executive's discretion whether by statute or prerogative is amenable to judicial review. However, whether such discretion is amenable to judicial review is dependent on the

facts of each case (see *R Rama Chandran, Kumpulan Perangsang Bhd and Petroliam Nasional Bhd v. Nik Ramli bin Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 652. It is generally held in those cases that not every decision of the executive could be subjected to judicial review). A

[37] The power provided under s. 20 of the CJA is exclusively a domestic matter concerning the internal management of allotting or dispensing of work among the judges of the High Court and therefore does not possessed the necessary public law element for it to be amenable for judicial review. From the authorities cited it is clear that not every administrative decision is amenable to judicial review. B

[38] In *Ahmad Jefri (supra)* the Federal Court laid down the parameter of matters amenable for judicial review in the following passage: C

> [22] It is widely accepted that not every decision made by an authoritative body is suitable for judicial review. To qualify there must be sufficient public law element in the decision made. For this, it is necessary to examine both the source of the power and the nature of the decision made; whether the decision was made under a statutory power (see para. 61 *Halsbury Laws of England*, 4th edn, 2001 Reissue, vol. 1(1)). D

[39] *Ahmad Jefri (supra)*, concerned the dismissal of a government officer from public service. The Federal Court found the presence of the public law element from both the source and the nature of the decision itself. The court held: E

> [35] ... The appellant was an officer within reg. 3 of the Public Officers (Conduct and Discipline) Regulations 1993 (Amended) 2002 (the Regulations). "Officer" under this regulation "means a member of the public service of the Federation". This Regulation is a statutory enactment made pursuant to cl. (2) of art. 132 of the Federal Constitution and it applies to an officer throughout the period of his service. F
>
> [37] ... the decision to dismiss the appellant was made under a statutory law by a body who acted within the scope of such statutory power. Though this decision involves the dismissal of an employee by an employer, much like a master dismissing his servant, which is a private law matter, the fact that there are statutory conditions and restrictions imposed by the Regulations on the conduct and dismissal of the appellant underpins the public law element in this case ... Here, a special statutory provision bears directly upon the right of a public authority to dismiss the appellant. This injects the element of public law necessary in this context to attract the remedies of administrative law making this case amenable for judicial review. G H

[40] *R (Beer)*, defined public law element as follows:

> It seems to me that the law has now developed to the point where, unless the source of power clearly provides the answer, the question whether the decision of a body is amenable to judicial review requires a careful I

A consideration of the nature of the power and function that has been exercised to see whether the decision has a sufficient public element, flavour or character to bring it within the purview of public law. It may be said with some justification that this criterion for amenability is very broad, not to say question-begging. But it provides the frame for the investigation that has to be conducted.

B

[41] In order to appreciate the subject matter at hand the facts in *R (Beer)* could be examined as follows:

(i) a county council acting under the Local Government and Housing Act 1989 had set up a farmers' market. Pursuant to the council's statutory C powers the running of the farmers' market was subsequently handed to a company limited by guarantee.

(ii) the company instead had refused to grant the claimant a licence to participate in a farmers' market programme. The Court of Appeal held that base on the factual matrix of the case the company had stepped into D the council's shoes and was performing the same functions as the council had previously performed.

(iii) the company was not a private company established to run markets for profit but to take over for a non-profit basis the running of markets previously operated by the council in the exercise of its statutory powers E in what was considered to be in the public interest.

(iv) The facts clearly showed that the company's functions were of a public nature. Hence, the company's decision to refuse the claimant's application for a licence was amenable to judicial review.

F **[42]** In *Manjit Singh Kirpal Singh and Another v. Attorney-General* [2013] 2 SLR 1108 the Singapore Court of Appeal had the opportunity to deal with the question whether, in some circumstances, a power conferred by statute may not be amenable to judicial review. In the course of resolving the issues in the case, the court referred to the Privy Council case of *Mohit v. Director* G *of Public Prosecutions of Mauritius* [2006] 1 WLR 3343 which held as follows:

> [28] ... the fact that a particular power stems from statute should ordinarily mean that it is amenable to judicial review in absence of compelling reasons to the contrary.
>
> [32] ... Where there is a compelling reason which indicates the absence H of such a public element in what is nonetheless a statutory power or duty, there would be no good reason to subject the exercise of such a power or duty, which may already be governed by private law obligations and remedies, to public law remedies in judicial review proceedings.
>
> [33] We therefore reject the appellants' broad submission that all statutory I powers are necessarily amenable to judicial review.

[43] The case of *Manjit Singh* related to the power of the Chief Justice pursuant to s. 90(1) of the Legal Profession Act 1976 to appoint a disciplinary tribunal to investigate complaints lodged with the law society and to revoke any such appointment made under s. 90(3). The appellants objected to the appointment of an ex-judge to head the disciplinary tribunal on the grounds that the relationship of the ex-judge with certain persons would put him in a position that he would not be able to exercise his powers in an objective and impartial manner. The appellants had requested that the ex-judge to be replaced with another person. The Court of Appeal held that the exercise of this power was amenable to judicial review. It is obvious from the statutory provisions that the Chief Justice's power of appointment and revocation would be based on certain conditions and limitations which has injected the necessary element of public law in the decision making process.

[44] The analysis of the above cited cases disclosed that the public law element is necessary for a decision to be amenable to judicial review. The source of the power derived from a statute is not conclusive unless clear on the face of the provision. Hence, the court would have to examine the nature of the power and function that has been exercised in order to determine whether the decision has sufficient public element, flavour or character to bring it within the purview of public law.

What Is The Nature Of Chief Justice's Power Under s. 20 Of The CJA

[45] The nature of the power exercised by the Chief Judge of Malaya pursuant to s. 20 of the CJA is discretionary. The power concerns the internal management of the High Court and the Chief Judge of Malaya is conferred absolute discretion to manage the distribution of work in the High Court of Malaya. It is His Lordship's management's prerogative to determine how the allotting or dispensing of work among the judges of the High Court is to be done.

[46] It is a matter of grave public interest that directives given by the Chief Judge of Malaya under s. 20 are not opened to challenge. Such actions would bring the business of the High Court to a grind. If the direction for the distribution of cases among judges could be challenged this in turn would bring chaos to the administration of justice through delays and adjournments. This is a strong compelling reason to exclude the general assumption that power that stems from statute is amenable to judicial review from the nature of the power that was exercised in this case.

[47] There is also no or insufficient public element, flavour or character to bring a decision directing a particular judge to hear a case within the purview of public law. The section provides no conditions or limitations in the exercise of the power, which is necessary to inject the element of public law in the decision made so as to attract the remedies of administrative law.

[48] Section 20 of the CJA is declaratory in nature. It requires that the business of the High Court is carried out as directed by the respective Chief Judges. The provision does not confer any right, whether directly or by implication, on the parties to object that the judge assigned to hear any proceeding ought to be replaced by another judge. This does not mean that the parties are without remedy as the parties have the right and are at liberty to apply for recusal of any judge assigned to hear their matter. This judicial avenue is provided and often resorted to by litigants.

[49] The facts in the case at hand showed that the suit was to be heard by the said judge pursuant to the Chief Judge of Malaya's "general" power of the distribution of business of the High Court prevailing at the Kuala Lumpur High Court. Upon his transfer to the High Court at Seremban the Chief Judge made a direction pursuant to his "particular" power for the said judge to continue hearing the matter. Both directions are but the manifestation of the exercise of power conferred upon the Chief Judge by s. 20 of the CJA.

[50] Therefore, on the facts disclosed had the said judge not been transferred and remained in the High Court at Kuala Lumpur there would have been no issue for him hearing the suit upon the recusal application having been withdrawn.

Conclusion

[51] In the light of the above reasonings I am of the view that leave ought not to be granted to the applicants to pursue the matter on the substantive motion. Enclosure 1 is therefore dismissed with costs of RM5,000 to be awarded to the Attorney General's Chambers.